IN THE MATTER OF THE CLAIM	*	**BEFORE THOMAS G. WELSHKO,**
OF FLORA T. HAMILTON,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF THOMAS	*	
MAMMEN,	*	**OAH No.: DLR-HIC-02-16-08431**
T/A ARTISTIC DESIGN BUILD, INC.,	*	**MHIC No.: 14 (75) 1137**
RESPONDENT	*	

* * * * * * * * * * * * *

PROPOSED DECISION

STATEMENT OF THE CASE

On April 17, 2015, Flora T. Hamilton (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $76,364.30 in alleged actual losses suffered as a result of the poor and incomplete performance of a home improvement contract by Thomas Mammen, t/a Artistic Design Build, Inc. (Respondent).

I held a hearing on February 17, March 31, April 4 and July 27, 2017 at the Office of Administrative Hearing's Satellite Office in Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). DeVan Daniel Washington, Attorney-at-Law, represented the Claimant, who was present.[1] Jude Wikramanayake, Attorney-at-Law, represented the Respondent, who was present. John Hart, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted thirty-two exhibits on behalf of the Claimant, thirteen exhibits on behalf of the Respondent, and seventeen exhibits on behalf of the Fund. (I have attached a complete Exhibit List as an Appendix to this decision.)

[1] Mr. Washington began representing the Claimant on the second day of hearing. On the first day of hearing, the Claimant appeared without representation.

Testimony

The Claimant testified in her own behalf and presented the testimony of Ernest C. Wims, a home inspector, trading as Wims Management Consulting Service. I accepted Mr. Wims as an expert in Home Inspections.

The Respondent testified in his own behalf and presented the testimony of Steve Perry, t/a Perry Aire Service. I accepted Mr. Perry as an expert in Heating Ventilation and Air Condition (HVAC) and Geothermal Units.

The Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 01-39778. (Fund Ex. 7.)

2. On November 20, 2010, the Claimant and the Respondent entered into a $217,600.00 contract to perform extensive renovations at the Claimant's Silver Spring, Maryland home. The contract stated that work would begin about ninety days after the signing of the contract and would be completed by no later than twenty-four to twenty-eight weeks later. (Cl. Ex. 3.)

3. The Respondent permitted the Claimant to select from various options regarding the installation of items such as the front portico, pocket doors, heating system and cabinets. There were thirteen options in all. The Claimant's choice of options increased the initial contract price by $25,460.12 to $243,060.12. (Test. Cl. and Resp.; Cl. Ex. 3.)

4. On November 20, 2010, the Claimant paid $81,020.04 to the Respondent as a down payment under the contract. (Cl. Exs. 1, 2 and 26.)

5. The Claimant and the Respondent ultimately agreed to forty-seven change orders. The costs associated with these change orders totaled $269,557.44 and brought the final contract price to $512,617.56. (Test. Cl.; Cl. Ex. 5.)

6. Of the forty-seven agreed-upon change orders, the most significant and costly were (1) rebuilding the three-story addition because of termite and water damage that the Respondent discovered during demolition ($80,747.86); (2) rebuilding the addition dormers ($25,412.94); (3) upgrading the HVAC to a geothermal unit ($90,000.00); (4) increasing the allowance for the kitchen cabinets ($10,249.82); and (5) installing basement windows ($7,786.62). (Cl. Exs. 5, 23 and 32.)

7. The Claimant ultimately paid the Respondent a total of $482,296.21 under the Contract through a series of checks. She made her final payment to the Respondent on November 16, 2012. (Cl. Ex. 26.)

8. On March 21, 2011, the Respondent attempted to begin work, but could not do so, because the Claimant and her family had not moved interior furniture to allow him to begin demolition. (Test. Resp.; Cl. Ex. 32; Resp. Ex. 13.)

9. On June 20, 2011, the Respondent began demolition, even though the Claimant had not removed the furniture as the Respondent had repeatedly requested. The Respondent's workers moved furniture out of the way and billed the Claimant for doing so. (Test. Resp.; Cl. Ex. 32; Resp. Ex. 12.)

10. Once work began, the Claimant impeded the progress by failing to make decisions that the Respondent requested about the style or design of items such as plumbing and electrical fixtures, tile and granite. With regard to plumbing fixtures, the Respondent first asked the Claimant to make a choice pertaining to particular fixtures on March 31, 2011. After ten

subsequent attempts over the year and a half, the Claimant finally made her plumbing fixture choice sometime in 2013. A similar pattern occurred with respect to other items as well. (Test. Resp.; Resp. Ex. 13.)

11. The inability of the Claimant to make decisions about the style or design of specific items when requested by the Respondent prevented the Respondent and his specialty trades crews (carpenters, HVAC installers, plumbers, hardwood floor installers) from working, because the Respondent and the specialty trades had to complete one part of the project before they could begin work on other parts of the project. (Test. Resp.)

12. The Claimant's daughter lived in the basement of the property at all times relevant. The Claimant's daughter turned away specialty trades crews subcontracted by the Respondent on four occasions between August 19, 2011 and September 28, 2012, preventing them from doing any work in the basement. (Test. Resp.; Cl. Ex. 32.)

13. The Respondent performed work under the contract until sometime in late 2012. At that time, the Claimant's husband asked that the Respondent provide him with certain fixtures. After the Respondent gave the Claimant's husband the fixtures, the Claimant did not respond to the Respondent's communications concerning whether she wanted him to do any more work. (Test. Resp.; Resp. Ex. 13.)

14. At the time the Respondent stopped work, many items remained incomplete. The incomplete items included refurbishing the master bathroom, dining room cabinet installation, kitchen cabinet installation, laundry room work and many electrical installations. (Test. Cl. and Resp.; Cl. Ex. 22.)

15. With regard to the kitchen cabinet installation, the Respondent, after first denying that he ordered the wrong cabinets, conceded that he had done so, but he and the Claimant were unable to resolve this issue successfully. (Test. Resp.; Cl. Ex. 22; Resp. Ex. 11.)

16. The Claimant was dissatisfied with the geothermal HVAC system supplied by Harvey W. Hottel, Inc. and installed by the Respondent. The Respondent installed the compressor for that system on the second floor, which produced noise that the Claimant found too loud. The Claimant also believes that the geothermal HVAC system unevenly heats her house during the winter. (Test. Cl.)

17. Because of the Claimant's complaints about the geothermal HVAC system, at the Claimant's urging, the Respondent sued Harvey W. Hottel, Inc.[2] (Test. Cl. and Resp.; Cl. Ex. 31.)

18. The Respondent sued the Claimant for the unpaid balance of the contract balance.[3] (Cl. Ex. 32.)

19. Once the Respondent stopped work, the Claimant employed a number of contractors to perform remedial work and complete items that the Respondent had not completed. (Test. Cl.; Cl. Exs. 6–20.)

20. The Claimant sought estimates from or had work performed by other contractors totaling $44,332.90. Unlicensed contractors accounted for $31,837.50 of this total. (Cl. Exs. 6–20; Fund Exs. 11–17.)

[2] The parties did not explicitly state what the outcome of this lawsuit was. I infer from the testimony of the Respondent and Mr. Perry that the Respondent did not prevail.

[3] The record does not reflect *when* the Respondent sued the Claimant. The parties alluded to this lawsuit during their respective cases and Claimant Exhibit No. 32 contains the Respondent's answers to interrogatories issued to him by the Claimant related to that lawsuit, but its filing date is not in the record.

21. In October 2014, the Claimant called the Respondent to secure a radiator that was not properly anchored to the floor. The Respondent came to make that repair. At that time, he discovered that other contractors had been working at the Claimant's home. (Test. Resp.)

22. The Claimant did not sustain an actual loss compensable by the Fund. (Test. Resp.; Resp. Ex. 13.)

DISCUSSION

In this case, the Claimant has the burden of proving the validity of her claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Md. Code Ann., Bus. Reg. § 8-405(a) (2015);[4] *see also* COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a licensed contractor"). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has not proven eligibility for compensation.

[4] Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. There are no *prima facie* impediments barring the Claimant from recovering from the Fund. Md. Code Ann., Bus. Reg. § 8-405(f) (2015).

This case involves complicated circumstances. On November 20, 2010, the Claimant and the Respondent entered into a $243,060.12 contract, which required the Respondent to perform extensive home improvement work at the Claimant's Silver Spring, Maryland home. A blizzard of change orders followed—forty-seven in all—that ballooned the original contract price from $243,060.12 to $512,617.56, an increase of $269,557.44. Of that $512,617.56 final contract price, the Claimant paid the Respondent $482,296.21. The original contract required the Respondent to complete all work twenty-eight weeks after starting construction. Instead, the project dragged on from June 2011 through approximately November 2012. Determining exactly when worked stopped is an enigma, because even after the Claimant and Respondent had ostensibly parted ways in late 2012, in October 2014, the Claimant called the Respondent to secure a loose radiator.

After considering the record as whole, I find the Respondent's evidence more credible than that of the Claimant. A recurring theme in the Respondent's testimony was the Claimant's refusal to make decisions. Those decisions concerned the style or design of items specified in the contract. When it came time to install many items, the Respondent asked the Claimant about what styles or designs she wanted, and the Claimant did not answer him—multiple times. Respondent's Exhibit No. 13 contains a timeline that the Respondent prepared, which recounts the number of occasions the Respondent asked the Claimant to make style or design decisions.

That timeline contains remarks such as "11/12/2012 – tile selection fourth request," "12/11/2012 – plumbing fixture request for the tenth time and other electrical decision," "9/4/2013 granite decision for the seventh time," and so on.

The Respondent noted that he relies on specialty trade subcontractors—carpenters, electricians and plumbers, for example—to perform work for him. In this regard, the Respondent explained, "We could not piecemeal the tasks with various trades coming; we needed to do them all at once." Therefore, without the Claimant selecting plumbing fixtures, a plumber would not be able to work with the Respondent's own personnel in completing the master bathroom portion of the contract. The Respondent acknowledged that he could have selected the styles and designs of the items himself and installed them in the Claimant's home as a *fait accompli*. He feared, though, that the Claimant would reject his selection and order him to remove and redo the work he had just done, which would cost him time and money. Consequently, he continued to wait for the Claimant to make decisions. While he waited for the Claimant's decisions, he could do no work. Ultimately, all work stopped after when the Claimant refused to tell the Respondent whether she wanted him to complete the contract.

The Respondent also averred that because of the Claimant's indecisiveness, he began work three months later than when he wanted to start. The Respondent noted that ideally, for his workers to start the first part of any home improvement project—demolition—there should be no furniture blocking the area to be demolished. The Respondent stated that as the anticipated start date approached, he repeatedly asked the Claimant to remove furniture from the rooms where he intended to work. When the Respondent attempted to start work on March 21, 2011, he could not proceed, because the Claimant had not removed the furniture as he had requested. He asked the Claimant to remove the furniture several times, but she continued to be dilatory in removing it—

even when the Respondent offered to find movers for her. On June 20, 2011, the Respondent ultimately decided that work had to begin, so he moved the Claimant's furniture out of the way and charged the Claimant for doing so. The Respondent had to charge the Claimant for moving furniture on several occasions throughout the time he was performing work under the contract. (Respondent's Exhibit No. 12.)

I find the Respondent's testimony credible, in part, because I observed the Claimant's indecisiveness first hand when the Claimant testified at the hearing. As a whole, I found the Claimant's testimony rambling and disorganized. She jumped from topic to topic haphazardly. The Claimant's focus on her Fund claim often strayed. Parts of the Claimant's testimony consisted of unsupported accusations against the Respondent and his workers. When I asked the Claimant a question about what her theory of recovery from the Fund was (value paid for versus value received or cost to repair or replace poorly done or incomplete items), the Claimant could not give a cogent answer.

The sheer number of change orders that the parties executed further illustrates the Claimant's indecisiveness. Of those forty-seven change orders, forty-five of them involved the Claimant's discretionary preferences rather than necessity. Only two truly involved necessity—rebuilding the third-story addition and rebuilding dormers, because the Respondent discovered irreparable termite damage in those areas. The Claimant obviously did not have a well-formed vision of what she wanted this contract to include.

Because I have found the Respondent more credible than the Claimant, I am accepting the Respondent's position regarding a number of disputed items. For instance, the Claimant contended that the Respondent had easy access to her home. She stated he could retrieve a key contained in a combination lock box conveniently located outside her home to gain entry any

time to perform work under the contract. The Respondent, though, maintained that the Claimant's daughter, who lived in the basement during the period at issue, turned away the Respondent's specialty trades crews four times while work was in progress, because she did not want them in the basement. The Claimant insisted that the Respondent refused to install the kitchen cabinets she selected after he procured the wrong ones. The Respondent admitted that, at first, he did not believe that he ordered the wrong cabinets, but the Claimant convinced him otherwise. He stated that he attempted to resolve the cabinet issue with the Claimant, but they could not come to an agreement about whether the Claimant owed only the allowance price for the cabinets or extra money for a cabinet upgrade (see e-mail exchange—Respondent's Exhibit No. 11).

One hotly disputed item was the installation of the geothermal HVAC system. The Claimant testified that the Respondent installed the compressor for that system on the second floor of the residence. She stated that it is noisy and keeps her and her family awake at night. She also asserted that the geothermal HVAC system heats her home unevenly. The Respondent, however, offered the unrefuted expert testimony of Steve Perry to demonstrate that the Respondent's installation of the geothermal HVAC system was adequate. I accepted Mr. Perry as an expert in HVAC systems, in general, and Geothermal HVAC systems in particular. Mr. Perry testified that while he would not have installed the compressor on the second floor, as the Respondent did, the geothermal HVAC system was functional and the noise level was acceptable.

The Claimant offered the expert testimony and inspection report of Ernest C. Wims concerning many items in her home subject to the contract that needed repair or completion, including the geothermal HVAC system. Mr. Wims's area of expertise is in Home Inspections

and not specifically geothermal HVAC systems, so any opinion that he might have offered about the performance of the system that the Respondent installed at the Claimant's home would not have been as informed as that of Mr. Perry. Mr. Wims did *not* actually offer an opinion about the viability of the geothermal HVAC system. In the "Heating" section of his inspection report, Mr. Wims states, "Provide manuals and service agreement for twenty-four months on functionality of heating system. Verify code correctness of upstairs furnace unit and balance of system." He gave the cost of performing these tasks as $3,500.00.

In general, Mr. Wims only provided opinions about how much it would cost to repair and complete items that the Respondent supposedly did not install properly or left incomplete. His opinion was short on explaining why the Respondent's work was inadequate. Mr. Wims also included cost estimates in his report to repair items that were not part of the November 20, 2010 contract, such as the deck and certain portions of wood trim.[5] (Claimant's Exhibit No. 24.)

To reiterate, section 8-405(a) of the Business Regulation Article allows an owner (i.e., claimant) to recover actual losses resulting from acts or omissions of licensed contractors, amplified by COMAR 09.08.03.03B(2) which refers to "actual losses. . . incurred as a result of misconduct by a licensed contractor." Section 8-401 of the Business Regulation further defines actual loss as "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." The Claimant simply failed to show that the Respondent engaged in any misconduct.

Hypothetically, if the MHIC had pursued regulatory charges against the Respondent based on the Claimant's complaints, it could have decided to charge him under section 8-605(1) of the Business Regulation Article. That subsection states, "A contractor may not . . . abandon or

[5] Asked by the Respondent's attorney why he included items not in the Claimant's contract with the Respondent in his report, Mr. Wims replied, "I never talk in terms of a partial home inspection."

fail to perform, without justification, a home improvement contract." Md. Code Ann., Bus. Reg. § 8-605(1) (2015). Here, I conclude that the Respondent *had* justification to leave this contract incomplete—the Claimant's reluctance to choose styles or designs of items for the Respondent to install and the multiple acts of the Claimant's daughter turning away the Respondent's specialty trades personnel to prevent them from working in the basement. The Claimant's indecisiveness, combined with the Claimant's daughter turning away the Respondent's specialty trades workers, clearly prevented the Respondent from completing the contract.[6]

For the sake of completeness, had the Claimant demonstrated that she qualified to receive reimbursement from the Fund, determining just how much the Fund should pay her would prove problematic. The Claimant used Mr. Wims's estimate to calculate the amount of her claim. (See the Claimant's Claim Form, Fund's Exhibit No. 8.) Mr. Wims estimated that it would cost $83,737.50 to repair and complete the Respondent's poor and incomplete work. Yet, as noted, Mr. Wims was not clear about how the Respondent performed work poorly and he certainly did not address the obstacles that the Claimant placed in the Respondent's way while he was performing the work. As alluded to above, the Respondent admits the project remained incomplete at the time he stopped working, but *why* it remained incomplete is the pivotal question. Mr. Wims did not satisfactorily answer that question. I will reiterate that Mr. Wims also included cost estimates in his report for repairing and completing items that were not part of the contract. Consequently, I reject the Wims estimate as a basis for determining the Claimant's actual loss.

[6] I reject one defense offered by the Respondent—the allegation that in late 2011, the Claimant's husband told the Respondent that he and his wife ran out of money and needed to get new loans to pay him for the remainder of the contracted work. Even if this statement were true, the Claimant eventually did secure additional funds or otherwise, she would not have been able to pay him a total of $482,296.21, just about $30,000.00 short of the total contract price.

Using the amounts the Claimant has paid or will be required to pay other contractors to repair and complete work under the original contract, instead of relying on Mr. Wims's estimate, presents difficulties as well. This is because the Claimant used at least three unlicensed contractors to do remedial work at her property. The Claimant had estimates from or paid a total of $27,307.79 under various contracts to J.L.R. JIRE Home Improvement to do such work. J.L.R. JIRE Home Improvement is an unlicensed contractor. The Claimant paid $2,929.77 under two contracts to Global Home Co., also an unlicensed contractor. The Claimant paid $1,600.00 under one contract to America's Shower Mirror Glass Company, which, similarly, is an unlicensed contractor. Of the $44,332.90 that the Claimant has paid to date or would be required to pay to correct or complete the Respondent's work, $31,837.50 involved payments to unlicensed contractors.[7]

The Fund maintains that it would be against public policy for the MHIC to reimburse the Claimant for work done by or expected to be done by unlicensed contractors. It argues that if the Fund reimbursed the Claimant to pay unlicensed contractors, the MHIC would be sanctioning violations the Maryland Home Improvement law, the law that the MHIC enforces. I agree. While the Fund could not cite any statute, regulation, policy or judicial decision to support its position, the Fund makes a logical argument that the MHIC should not be a party to licensing violations. Therefore, after subtracting the amount the Claimant has paid or would be required to pay unlicensed contractors, what remains is $12,495.40 ($44,332.90 - $31,837.50). That amount

[7] The Fund offered alternative licensing records for contractors that had similar names to those used by the Claimant and asked me to make my own conclusions concerning whether these were the same contractors that the Claimant hired. After reviewing those records and seeing where those similarly named contractors did business, I conclude those similarly named contractors were not the ones that the Claimant used or intended to use to perform remedial work at her residence.

consists of the money that the Claimant paid or would be expected to pay BBC Construction/Remodeling, L.L.C., two electrical contractors and some material suppliers, entities which are either licensed by the MHIC or do not need to be. [8]

Using the following formula, found in COMAR 09.08.03.03B(3)(c), under the hypothetical circumstances discussed above, I would have found that the Claimant sustained no compensable actual loss:

> If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

The Claimant paid $482,296.21 to the Respondent under the original contract. She paid or intends to pay a total of $12,495.40 to legitimate contractors and material suppliers for the repair and completion of the Respondent's work. Adding $12,495.40 to $482,296.21 yields a sum of $494,791.61. Subtracting the final contract price of $512,617.56 from $494,791.61 produces a negative number.

For the reasons outlined in detail above, I am recommending that the MHIC Guaranty Fund deny the Claimant's claim for reimbursement.

[8] It could be argued that a contractor does not need to be licensed to provide an estimate. Assuming this to be true, the April 3, 2015 J.L.R. JIRE estimate for $7,810.00 would be acceptable as a basis for determining the Claimant's actual loss. Adding that amount to the Claimant's demonstrated cost to repair and complete would not change the outcome. The new cost to repair and complete total of $502,601.61 would still be less than the original contract price.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(a) (2015); COMAR 09.08.03.03B(2).

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

Signature on File

October 12, 2017
Date Decision Issued

Thomas G. Welshko
Administrative Law Judge

TGW/sw
170160

PROPOSED ORDER

WHEREFORE, this 3rd day of November, 2017, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

I. Jean White

I. Jean White
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION